

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DION JAMES,

Defendant-Appellant.

UNPUBLISHED

November 21, 2006

No. 263858

Wayne Circuit Court

LC No. 04-012684-02

Before: Whitbeck, C.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant was convicted of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). Defendant was sentenced to two years' probation. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Trial testimony revealed that a police officer conducting surveillance observed defendant standing with two other men on the sidewalk. A woman then walked up to defendant and engaged in a brief conversation with him. The woman then gave defendant what the officer believed to be money. Once defendant received the money, he proceeded between two nearby houses where he remained for approximately one minute and a half. Defendant then walked back to the woman and handed her something in a cupped-hand fashion. The woman quickly walked away and defendant was observed handing the suspected money to another man who stood nearby. The officer conducting surveillance believed this to be a narcotic transaction. A subsequent search by a police officer revealed a bag of cocaine and marijuana between the two houses. Police never stopped the woman who was observed in what appeared to be a narcotic transaction with defendant because when officers engage in surveillance, they typically do not stop the first buyer so that they can continue to observe the scene before any arrests are made.

Defendant's sole issue on appeal is that there was insufficient evidence to support his convictions. We disagree.

II. STANDARD OF REVIEW

When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). This Court reviews the

evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

III. ANALYSIS

Defendant argues that the prosecution failed to present legally sufficient evidence to support his convictions. Specifically, defendant argues that the prosecution could not prove beyond a reasonable doubt that defendant possessed the drugs that were found between the two houses. Defendant emphasized the following facts to support his case: drugs were never found on defendant; the surveillance officer merely thought she saw a drug transaction but she could not be certain; the surveillance officer was not able to see what defendant was doing when he went between the two houses; others had access to the area where the drugs were found; the police never detained the alleged buyer; and the police never conducted a fingerprint analysis of the bag of drugs to confirm defendant had touched it. Given these facts, defendant argues that the prosecution could not directly link defendant to the drugs, and defendant's mere presence at the location where drugs were found is insufficient to prove constructive possession.

To prove that a defendant possessed a controlled substance with the intent to deliver, a prosecutor must show: (1) that the substance was a controlled substance; (2) the weight of the substance; (3) that the defendant was not authorized to possess the substance; and (4) that the defendant knowingly possessed the substance with the intent to deliver. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, mod 441 Mich 1201 (1992). To be guilty of possession of a controlled substance, a defendant need not have had actual physical possession of it; possession can be actual or constructive. Possession may be established even if the defendant was not the owner of the substance, and more than one person may possess a substance. However, a person's presence where a controlled substance is found is not alone sufficient to establish possession. Rather, some additional connection must be shown. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). The key question is whether the defendant had dominion and control over the substance. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). Constructive possession exists where the defendant has the right to exercise control over the narcotics and has knowledge of its presence. *Wolfe, supra* at 520-521.

Although it is true that mere presence at the scene of a crime does not make a person a knowing participant in the crime, the prosecution presented additional evidence connecting defendant to the drugs. At least two factors were shown that linked defendant with the drugs between the houses. One factor is the suspected drug transaction testified to by the officer conducting surveillance. The second factor is that a bag of drugs was found between the two houses wherein defendant was seen immediately before he handed a woman a small item in a cupped hand fashion. This tends to show that defendant had knowledge of the presence of the drugs and a right to control the drugs. Constructive possession of a controlled substance exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Wolfe, supra* at 521. "Possession with intent to deliver can be established by circumstantial evidence and reasonable inferences arising from that evidence, just as it can be established by direct evidence." *Id.* at 526. "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Hardiman, supra* at 248.

The prosecution's main witness was a police officer who had 13 years of experience in the Narcotics Division and had conducted over 100 surveillances. She testified that she had a clear, unobstructed view of defendant and that she saw him receive money from a woman, go between the two houses where drugs were subsequently found, and return with something cupped in his hand which he gave to the woman. With regard to the way the police handled the investigation of defendant, testimony indicated that the police followed standard protocol. Testimony of the surveillance officer indicated that when officers engage in surveillance, they typically do not stop the first buyer. With regard to the failure to conduct fingerprint analysis of the bag of drugs, an officer testified that the police department rarely conducts a fingerprint analyses of paper bags because of the difficulty in obtaining prints from paper bags.

In the instant case, there is sufficient circumstantial evidence of dominion and control to establish constructive possession. "Even in a case relying on circumstantial evidence, the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide." *Konrad, supra* at 273 n 6. It is for the jury to weigh the evidence presented at trial. *Hardiman, supra* at 428. Here, a rational trier of fact could have found that there was sufficient evidence to convict defendant of possession with intent to deliver cocaine and possession with intent to deliver marijuana.

Affirmed.

/s/ William C. Whitbeck

/s/ Henry William Saad

/s/ Bill Schuette